

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

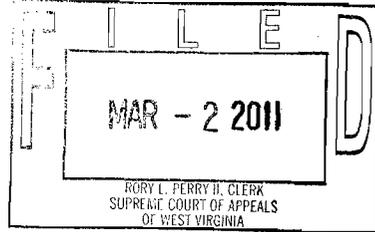
SAIRA AHMAD,

Appellant,

v.

SAED AFTAB AHMAD,

Appellee.



No. 35741

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BRIEF OF APPELLEE

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Saed Aftab Ahmad,

Appellee,

By Counsel:

A handwritten signature in black ink that reads "Troy N. Giatras".

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**No. 35741**

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**Appellee.**

**BRIEF OF APPELLEE**

Now Comes Appellee Saed Aftab Ahmad, by counsel, and respectfully requests that this Honorable Court affirm the Circuit Court's rulings. Appellee Saed Aftab Ahmad further states as follows in support of this request:

**STATEMENT OF THE CASE**

Following their marriage in Pakistan in 2000, Appellee, Dr. Saed Aftab Ahmad (Dr. Ahmad), and Appellant Saira Ahmad (Appellant) lived together as husband and wife in Poca, Putnam County, West Virginia until April 2008. The couple had two children together.

In April 2008, Dr. Ahmad was forced to abruptly return to the couple's native country of Pakistan due to family obligations. Since that time, Dr. Ahmad has attempted, on numerous occasions to invite Appellant to move back to Pakistan with the couple's children. Appellant has continued to refuse this request.

On May 19, 2008, Appellant filed for divorce, custody, spousal support, and child support in the Family Court of Putnam County. Appellant, claiming abandonment,

petitioned the Family Court of Putnam County for an order granting her permanent custody of the children as well as significant sums of child support and alimony.

Dr. Ahmad was in Pakistan at the time of the filing of the original divorce petition and remained there through the entirety of the Putnam County Family Court proceedings. At all times prior to and during the Putnam County proceedings, Dr. Ahmad was a citizen of Pakistan. At all times throughout the Putnam County proceedings, Dr. Ahmad was a resident of Pakistan. In fact, after returning to his and Appellant's home country in April of 2008, Dr. Ahmad has never returned to the United States, let alone the jurisdiction of the Putnam County Family Court.

Throughout the course of the Putnam County Family Court Proceedings, Appellant took a number of improper steps to effectuate service of process. These steps were all designed to seem as though Appellant was providing Dr. Ahmad with notice of this matter without actually providing Dr. Ahmad with notice of this matter. First, Appellant sent notice of this action to a post office box that allegedly belonged to Dr. Ahmad even though Appellant and/or her attorneys knew that that could not constitute proper service and that Dr. Ahmad could not be reached directly through that post office box.

Next, Appellant purported to effect service by publication. This effort, however, was also not designed to provide any actual notice to Dr. Ahmad as Appellant, knowing Dr. Ahmad was living in Pakistan and had no family or other significant connections to Putnam County, West Virginia, placed the notices of publication in local newspapers. No notices were placed in Pakistani newspapers or other publications which Dr. Ahmad might actually see.

Without Dr. Ahmad ever receiving proper notice, on June 18, 2008, pursuant to Appellant's motion, the Putnam County Family Court entered an order freezing Dr. Ahmad's personal bank accounts. The Order also directed Dr. Ahmad's former employer, Charleston Area Medical Center, to withhold all income payments and bonus checks for the purpose of fulfilling child support obligations.

On October 21, 2008 a Temporary Order was entered by the Putnam County Family Court. The Order contained findings of fact and conclusions of law including that the Court has subject matter jurisdiction and *in personam* jurisdiction. To support its finding of *in personam* jurisdiction, the Court stated that the Respondent "ha[d] received notice both via regular mail and via email, receipt of which is evidenced by his emailed response to petitioner's counsel." Evidently, counsel for Appellant learned through her client of Dr. Ahmad's last known email address. With that knowledge, Appellant's counsel forwarded notice of the divorce proceedings to the email address. This, however, despite the Putnam County Family Court's ruling, did not constitute proper service or effective notice.

The Temporary Order of October 21, 2008, which was entered without the court ever hearing Dr. Ahmad's testimony or information on his ability to pay, ordered that Dr. Ahmad pay Appellant a monthly sum of \$7,825.00 for the support of the children. This monthly child support was retroactively put into effect with the starting date of May 1, 2008. The Order created an immediate arrears amount in excess of \$25,000.

In addition to child support, the Putnam County Family Court ordered temporary spousal support in the amount of \$10,000 per month. The spousal support order was

retroactively put into effect to be enforced since the time of the initial separation between Dr. Ahmad and Petitioner, again immediately creating an arrearage amount in excess of \$50,000.

The Temporary Order also ordered the Bureau of Child Support Enforcement to immediately institute proceedings pursuant to *W. Va. Code § 48-15-104* to suspend Dr. Ahmad's medical license, board certification, and any other professional license and DEA number, driver's license, hunting license, fishing license, or any other license or certification held. A Final Order effectuating the original findings of fact and conclusions of law articulated in the Temporary Order was entered by the Family Court of Putnam County on June 16, 2009. This Final Order was entered without the Putnam County Family Court ever obtaining *in Personam* jurisdiction over Dr. Ahmad.

Prior to the entry of the Final Order, Dr. Ahmad did attempt to contact the Putnam County Family Court to explain his position that the court had no jurisdiction over him and his wife and that their Pakistani marriage should be terminated, if termination was necessary, in the country in which they were married, Pakistan, but, nothing was done to assist Dr. Ahmad in voicing his objection to its jurisdiction. After the Putnam County Family Court entered its Final Order, it was finally explained to Dr. Ahmad that he would need West Virginia counsel to properly contest jurisdiction in this matter. Upon being informed of that fact, Dr. Ahmad promptly obtained West Virginia counsel.

Dr. Ahmad's West Virginia counsel timely filed a motion with the Putnam County Circuit Court contesting the Putnam County Family Court's jurisdiction over Dr. Ahmad.

This matter was fully briefed by both parties, and on April 20, 2010, the Putnam County Circuit Court entered a substantial and well-researched memorandum Order regarding the Family Court's jurisdiction over Dr. Ahmad. In that Order, the Putnam County Circuit Court found that the Family Court had subject matter jurisdiction under the divisible divorce doctrine recognized in this State. The Putnam County Circuit Court went on to find, however, that in order to obtain *in personem* jurisdiction over Dr. Ahmad, Appellant would need to serve Dr. Ahmad through the West Virginia Secretary of State. Appellant completed service through the West Virginia Secretary of State as requested but then, for reasons unknown also filed the instant appeal with this Court challenging the ruling of the Putnam County Circuit Court with which she had already complied.

#### **SUMMARY OF ARGUMENT**

Dr. Ahmad maintains that the Putnam County Circuit Court did not err in its April 20, 2010 ruling. The constitutional importance of service of process and of obtaining jurisdiction over a person to be subject to a court's rulings cannot be minimized, and the Putnam County Circuit Court clearly recognized that, under the facts presented to it, service of process on the West Virginia Secretary of State was the only proper way, and the easiest way, for Appellant to effect proper service on Dr. Ahmad. The Putnam County Circuit Court's ruling should additionally not be disturbed, however, because this appeal has been mooted by Appellant obtaining service on Dr. Ahmad through the West Virginia Secretary of State prior to this Court's consideration of the issues presented. Accordingly, the Putnam County Circuit Court's ruling should not be disturbed.

## ARGUMENT

### I. Appellant's arguments are moot and cannot be addressed by this Court.

Appellant has voluntarily mooted her arguments by, after the Putnam County Circuit Court entered its ruling, serving Dr. Ahmad with divorce, custody, and support papers through the West Virginia Secretary of State. Thus, this Court cannot consider Appellant's arguments.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." See *Powell v. McCormack*, 395 U.S. 486, 496 (1969); see also *State ex rel. Bluestone Coal Corp. v. Honorable James P. Mazzone*, 697 S.E.2d 740, 747 (W. Va. 2010). "Thus, mootness may occur when the circumstances of the case change during the course of its pendency." See *Bluestone*, 697 S.E.2d at 747 (citing *Friends of Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Alternatively, a case can become moot if the parties thereto experience a change in status. See *id.* (citing *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 593-94 (1984) ("[A] case, although live at the start, becomes moot when intervening acts destroy the interest of a party to the adjudication.")).

This Court cannot generally consider a moot case on its merits. See *Bluestone*, 697 S.E.2d at 747. This is because "[m]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court." See Syl. pt. 1, *State ex rel. Lilly v. Carter*, 60 S.E. 873 (W. Va. 1908).

One particularly applicable example of mootness is seen in the case of *Velogol v. City of Weirton*, 575 S.E.2d 297 (W. Va. 2002). In this recent case, the City of Weirton

passed an ordinance imposing a fire and police service fee upon its citizens. *See id.* at 297. This ordinance was passed without meeting an applicable statute's publication requirements. *See id.* Plaintiffs objected to the passing of the ordinance without meeting the publication requirements, but, while the suit was pending, the City of Weirton re-passed the ordinance after meeting the publication requirements. *See id.* This Court declined to enter a ruling as the case was moot. *See id.* at 299.

This case is very similar to the *Velogol* case in that one of the parties, in this case Appellant, took an action during the course of this proceeding to render it moot. In this case, when Appellant elected to serve Dr. Ahmad through the West Virginia Secretary of State rather than waiting for this Court to rule, she effectively voided this Court's jurisdiction over this matter by making the service issue moot.

Further, although this Court will, on rare occasion, decide a moot case if it meets certain criteria, this case does not fall within that certain criteria. This case does not meet those criteria because, as proceedings are continuing in the Family Court of Putnam County: the relationship of the litigants is no longer affected; the parties no longer have a concrete interest in the outcome of the litigation; and this is not an issue that would have inevitably evaded review. Accordingly, this matter must be dismissed as moot.

**II. Appellant's appeal must be denied as the West Virginia Long-Arm Statute was the only way method of service that comported with West Virginia Rule of Civil Procedure 4 that was available to her.**

Appellant should also be denied the relief she seeks because the Putnam County Circuit Court did not err in deciding that Appellant was required, pursuant to West

Virginia law, to properly serve Dr. Ahmad through the West Virginia Secretary of State in order to obtain personal jurisdiction over Dr. Ahmad.

In this case, Appellant sought two forms of relief, a divorce and custody and monetary support. No one disputes that under the divisible divorce doctrine and under the statutes affecting child custody Appellant was able to obtain a divorce and custody. See *Burnett v. Burnett*, 542 S.E.2d 911, 916 (W. Va. 2000). What is contested is whether the Putnam County Family Court ever obtained sufficient personal jurisdiction over Dr. Ahmad to enter an order affecting his personal property interests.

“In order to obtain personal jurisdiction over a nonresident defendant, reasonable notice of the suit must be given the defendant.” See Syl. pt. 2, *Pries v. Watt*, 410 S.E.2d 285 (W. Va. 1991). “There must also be a sufficient connection or minimum contacts between the defendant and the forum state so that it would be fair and just to require a defense to be mounted in the forum state.” See *id.* Thus, the first step, and the only step at issue in this case, is to decide if reasonable notice of the suit has been given.<sup>1</sup>

Reasonable notice of suit in West Virginia is accomplished through proper service of process and is governed by West Virginia Rule of Civil Procedure 4. See W. Va. R. Civ. Pro. 4 (2011). Pursuant to this rule, service of process may only be affected

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<sup>1</sup> The focus of the argument before the Putnam County Circuit Court was on minimum contacts, not reasonable notice. Dr. Ahmad vehemently maintained throughout the proceedings before the Putnam County Circuit Court that he did not have sufficient minimum contacts with West Virginia to require him to appear and defend in this State. Dr. Ahmad maintains that argument and further maintains that this Court’s recent ruling in *Nezan v. Aries Techs., Inc.*, \_\_\_ S.E.2d \_\_\_, 2010 W. Va. LEXIS 129 (W. Va. Nov. 17, 2010), supports that argument. Dr. Ahmad, however, did not appeal the Putnam County Circuit Court’s ruling on that issue. Therefore, the only issue before this Court at this time is whether the Putnam County Circuit Court erred in finding that Appellant should serve Dr. Ahmad through the West Virginia Secretary of State rather than through publication, mailing to a post office box, e-mail, or some other method.

by: personal delivery of the summons and complaint, delivery of the summons and complaint to the individual's home to a family member over the age of sixteen, delivery of the summons and complaint to an agent or attorney in fact authorized by appointment or statute to accept service of process, or delivery by mail where the individual served returns an acknowledgment that they have been served. *See id.*

If none of the methods listed above are available, a plaintiff may try to serve an individual defendant through constructive service pursuant to West Virginia Rule of Civil Procedure 4(e) (2011). However, to serve through this method, a plaintiff must file an affidavit that, among other things, there is no statutory agent upon whom service may be had. *See W. Va. R. Civ. Pro. 4(e)(B) (2011).* Thus, this method of service is not available when there exists a statutory agent upon whom service of process may be made. *See id.*

Here, Appellant is asserting that the Putnam County Circuit Court erred in finding that service by publication was not proper and that the only method of service available to Appellant was through the West Virginia Secretary of State. This argument is in error. The Putnam County Circuit Court did not foreclose service of process on Dr. Ahmad through one of the other methods listed in West Virginia Rule of Civil Procedure 4 such as personal service on Dr. Ahmad or his residence or service through acknowledgement, but the Putnam County Circuit Court did rule that West Virginia Rule of Civil Procedure 4 must be complied with, and found that, realistically, the only way to comply with West Virginia Rule of Civil Procedure 4 in this case would be service through the West Virginia Secretary of State as Dr. Ahmad was not a resident of this or any other State, thus making personal service difficult as well as service on Dr. Ahmad's

residence. Finally, with regard to service through publication, the Putnam County Circuit Court simply found that it was not available because it was a less favored method of providing notice of suit and a more favored method, service through an agent was available. Accordingly, Appellant's arguments as to service by publication fail.

Appellant's arguments as to service through Mr. Wright, an alleged agent, also fail for two reasons. First, these arguments fail because there is a great difference between giving someone the right to open your mailbox and collect your mail and giving them the right to act as an agent for service of process. It is routine in this country that when someone is going to be out of town they might ask a neighbor or a friend to pick up their mail or even forward it for them. This does not make that person an agent for service of process as that person must be specifically designated an agent for service of process. See *e.g. Bowers v. Wurzburg*, 519 S.E.2d 148, 164 (W. Va. 1999).

Second, and more importantly, these arguments fail because service by mail does not constitute service under West Virginia Rule of Civil Procedure 4 where it does not go to the defendant's residence or where no acknowledgment is signed and returned. Here, the Appellant received no acknowledgement from Dr. Ahmad's alleged agent, Mr. Wright, nor did the summons at issue get delivered to Dr. Ahmad's home. It was simply mailed to a post office box where Dr. Ahmad occasionally received mail. That method of attempted service did not constitute proper service of process. Therefore, Appellant's arguments that she effectively served Dr. Ahmad through the gentleman responsible for picking up mail from his post office box, Mr. Wright, also fail.

That leaves only service by e-mail and an alleged general appearance as Appellant's only arguments that proper service was effected on Dr. Ahmad before the

Putnam County Family Court entered its ruling as to alimony and child support. First addressing e-mail, e-mail is not a recognized method of service under West Virginia Rule of Civil Procedure 4. Thus, that argument is easily disposed of. Where that issue becomes more complex is that Appellant is arguing that, due to receiving the e-mails from Appellant, Dr. Ahmad made a general appearance before the Putnam County Family Court and thus waived his right to object to jurisdiction. This issue is highly fact specific and was not addressed by the Putnam County Circuit Court, thus it should not be addressed by this Court on appeal, but even if this Court were to address this issue it would find that Dr. Ahmad did not make a general appearance.

Under West Virginia law,

It is not necessary for a defendant, in appearing in a court of record to quash a defective writ, commencing an action, to cause the record to recite that his appearance is for that purpose only, in order to avoid a waiver of defect in the jurisdiction of the court. In such case, whether an appearance is general or special is to be determined by the record as it stands at the time the motion is made.

See Syl. pt. 4, *Fisher, Sons & Company v. Crowley*, 50 S.E. 422 (W. Va. 1905).

In this case, for majority of the time this case was pending before the Putnam County Family Court Dr. Ahmad was unrepresented. For a small portion of that time, Dr. Ahmad was represented by counsel from Pakistan, but that representation cannot be considered effective by this Court as Dr. Ahmad's Pakistani counsel was not licensed in West Virginia and had no right to appear as counsel. Thus, effectively, Dr. Ahmad was self-represented during the entire pendency of the family court action.

Being self-represented, Dr. Ahmad could not be expected to know what precise legal arguments he would need to make to make a special appearance to contest jurisdiction. Yet, as discussed in the *Fisher* case as set forth above, there are no magic

words that need to be said. All a defendant has to do to appear and contest jurisdiction is to maintain that jurisdiction is not proper over him or her. Dr. Ahmad did that. Even Appellant admits that Dr. Ahmad's pro se arguments to the Putnam County Family Court that he was a citizen of Pakistan and all other arguments prior to retaining "counsel" likely did not suffice as a general appearance.

Appellant goes on to argue, however, that Dr. Ahmad made a general appearance when his Pakistani "counsel" filed a notice of appearance and a document Appellant is labeling an Answer. Yet, these documents clearly cannot be considered properly filed under West Virginia law as they were not signed by either the party or an attorney licensed in the State of West Virginia.

Here, Dr. Ahmad took every step known to him to object to the Putnam County Family Court's jurisdiction over him. He did not make a general appearance and did not waive his constitutional right to be properly served with notice of Appellant's action against him. Therefore, the Putnam County Circuit Court did not err when it ruled that Appellant did not properly serve Dr. Ahmad with service of process, and its ruling should not be disturbed on appeal.

### **CONCLUSION**

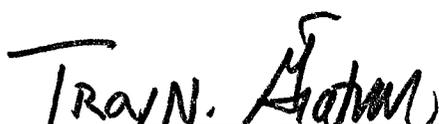
It is a fundamental constitutional right in this state and in this country, that a monetary judgment cannot be assessed against a defendant who has no proper notice that there is a suit pending against him or her. In this case, Appellant tried to avoid providing Dr. Ahmad with proper notice by attempting to serve him by e-mail, through a post office box, and by publication in an area she knew he did not reside in. These attempts all failed to provide Dr. Ahmad with formal notice of Appellant's suit for spousal

and child support. The Putnam County Circuit Court recognized this fact and also recognized that the easiest and most proper way to serve Dr. Ahmad with service of process would be through the West Virginia Secretary of State. Then, after that ruling, Appellant complied with the Putnam County Circuit Court's ruling before bringing this appeal. Thus, Appellant's request for reversal of the Putnam County Circuit Court's ruling must be denied because it is moot and because the Putnam County Circuit Court did not err in finding that the West Virginia Secretary of State was the appropriate agent for service of process on foreign defendant Dr. Ahmad.

WHEREFORE, for the reasons set forth above, Appellee Saed Aftab Ahmad, by counsel, respectfully requests that this Honorable Court dismiss this matter as moot and/or affirm the Circuit Court's rulings. Appellee Saed Aftab Ahmad also requests such other and further relief as this Honorable Court deems just.

SAED AFTAB AHMAD,

By Counsel

  
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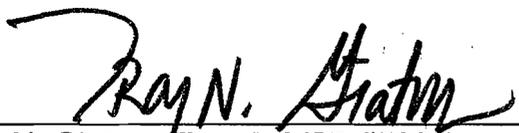
CERTIFICATE OF SERVICE

I, Troy N. Giatras, Esquire, do hereby certify that a true copy of the foregoing "*Brief of Appellee*" has been forwarded via United States Mail, postage prepaid, in an envelope addressed to the following:

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